No. 07-148

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In The
Supreme Court of the United States

CONAGRA, INC., CONAGRA FOODS, INC., CONAGRA HIDE DIVISION, CONAGRA BEEF COMPANY, and MONFORT, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, *ex rel.* ALI BAHRANI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. The Opposition Fails to Address the Key Issue Raised by the Petition 2

II. The Conflict With the Eighth and Sixth Circuits Is Not "Illusory." 5

III. Bahrani's Arguments About Ancillary Matters Do Not Diminish the Importance of the Question Presented 8

A. The issue presented is not whether "regulations can form the basis of a valid FCA obligation." 8

B. This Court should not defer review merely because this case was decided on summary judgment. 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

American Textile Manufacturers Institute v. The Limited, Inc., 190 F.3d 729 (6th Cir. 1999) 6

United States ex rel. Huangyan Import & Export Corp. v. Nature's Farm Prods., Inc., 370 F. Supp. 2d 993 (N.D. Cal. 2005) 7

United States v. Q International Courier, Inc., 131 F.3d 770 (8th Cir. 1997) 1, 5, 6, 8

STATUTES

31 U.S.C. § 3729(a)(7) 3

RULES

Sup. Ct. R. 10 7

REGULATIONS

9 C.F.R. § 350.7(a) 3

INTRODUCTION

Respondent Ali Bahrani's Brief in Opposition ("Opposition" or "Opp.") never addresses the Question Presented by ConAgra's Petition. Rather, Bahrani focuses on the underlying regulatory question: whether ConAgra, upon discovering that an existing export certificate contained significant errors, was required to obtain a replacement certificate to legally export certain goods. But, the Petition *assumes* – for the sake of argument – the existence of this regulatory requirement, *i.e.*, that ConAgra *was* required to obtain a replacement certificate to legally export the goods. Bahrani's Opposition begs the broader question of whether ConAgra had an *obligation*, within the meaning of the FCA, *to pay the user fee* for a replacement certificate that ConAgra never requested and never obtained. In other words, could ConAgra have violated the FCA by not obtaining replacement certificates? This is an important question on which the Tenth Circuit has diverged from other circuits, and it warrants the Court's attention.

Further, there is no merit to Bahrani's claim that the circuit conflict created by the Tenth Circuit's decision is "illusory." The Eighth Circuit squarely held in *United States v. Q International Courier, Inc.*, 131 F.3d 770, 772-74 (8th Cir. 1997), that a governmental user fee cannot constitute an "obligation" to pay money under the FCA where the underlying governmental service for which the user fee would have been charged was never requested or received. The issue here is indistinguishable, and the Tenth

Circuit reached the opposite result. Had the facts in this case been presented to the Eighth Circuit, the case would have been dismissed.

I. The Opposition Fails to Address the Key Issue Raised by the Petition.

Incorrectly characterizing this case as involving a "fact-bound" inquiry in which the Tenth Circuit merely applied "settled legal principles" to the underlying facts, Bahrani never addresses the question presented for review. Bahrani simply assumes that a regulatory requirement obligating ConAgra to obtain replacement export certificates under certain circumstances necessarily equates to an *obligation* within the meaning of the FCA to *pay money* to the Government. Opp. 8-9, 16-17, 26. Thus, according to Bahrani, the real issue in this case is determining whether the applicable USDA regulations required ConAgra to obtain a replacement certificate upon discovering that an original certificate contained significant inaccuracies, an issue that Bahrani characterizes as "narrow" and "fact-bound." Opp. 13. Indeed, Bahrani spends much of his Opposition arguing about the existence of this purported regulatory requirement. Opp. 8, 16-17. Bahrani misses the point.

The Petition assumes *arguendo* that ConAgra had a regulatory requirement to obtain replacement export certificates under certain circumstances. Petition for Writ of Certiorari ("Pet.") 10. But, as demonstrated by the Petition, ConAgra had no duty *to pay*

for replacement certificates that were in fact never requested or issued. Pet. 13-14. Consequently, there was no existing obligation to pay money to the Government on which a reverse false claim under Section 3729(a)(7) could be based.

Bahrani does not seriously dispute the lack of any duty to pay money for replacement certificates that were never issued. In fact, he effectively *concedes* that the fees for export certificates (including replacement certificates) are "user fees" the obligation to pay for which is not triggered unless the certificate is requested, the corresponding inspection services are performed, and the certificate is issued. Opp. 3-4 ("The fees are referred to as 'user fees' because the government charges the user, not the taxpayer, *for the processing time it takes a USDA veterinarian to review, prepare, and execute export certificates* for foreign commerce.") (emphasis added); *id.* at 4 (recognizing that the Secretary of Agriculture is authorized to "collect user fees *for export certification services*") (emphasis added). Bahrani also quotes 9 C.F.R. § 350.7(a), which provides that "[f]ees and charges for service under the regulations in this part shall be paid by the applicant *for the service* in accordance with this section." (emphasis added).

Although, in a footnote, Bahrani asserts that "Petitioner misstates the regulations in arguing that it has no obligation to pay a user fee unless ConAgra seeks and the government issues the export certificates," Opp. 6 n.5, he cites no authority to support that assertion. Tellingly, Bahrani makes no effort to

refute the numerous authorities that fully support ConAgra's argument. Pet. 13-14. Bahrani also asserts that "[t]he replacement export certificate fee at issue in this case is simply the price of exporting certain products to certain countries." Opp. 26. But, again, Bahrani does not and cannot point to any authority suggesting that the fee for a replacement export certificate is owed simply because a company exports goods without obtaining such a certificate. Rather, the fee is assessable, and money is owed, *only if* an exporter requests a replacement certificate and obtains inspection services, which did not occur here. Pet. 13-14.

Contrary to Bahrani's argument, the Question Presented does not involve *any* disputed interpretation of USDA regulations. Rather, it presents for review a much broader question: whether a person who engages in a regulated activity violates the FCA's reverse-false-claims provision by failing to obtain a required certificate that *would have* generated a user fee if (but only if) the certificate had been requested and obtained. This is an important statutory construction issue under the FCA that has broad ramifications beyond the particular facts of this case. Pet. 15-20. By attempting to convert this case into an unimportant fact-bound inquiry, Bahrani never addresses the question presented to the Court.[1]

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[1] Bahrani also strays from the legal issue by asserting that ConAgra has misstated certain underlying facts. The record

(Continued on following page)

II. The Conflict With the Eighth and Sixth Circuits Is Not "Illusory."

Bahrani contends that the Eighth Circuit's decision in *United States v. Q International Courier, Inc.*, 131 F.3d 770 (8th Cir. 1997), is factually distinguishable because, unlike the present case, *Q International* involved a potential "fine or penalty." Opp. 19-23. That is incorrect. The Government argued in *Q International* that the defendants had violated the FCA, not because they sought to avoid a fine or penalty, but because "the defendants owed an obligation to the United States *for the full domestic postage* for each letter." *Q International*, 131 F.3d at 772 (emphasis added). Rejecting this argument, the Eighth Circuit held that, while the defendants *should have* used domestic postal service (and thus should have purchased domestic postage) to comply with the applicable postal regulations, the defendants had no *obligation to pay for* domestic postage where domestic postal service was in fact not requested or used. *Id.* at 773-74. Thus, the Eighth Circuit held that the defendants in *Q International* did not avoid any existing, monetary obligation that could subject them to FCA

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shows that there is no support for Bahrani's assertions. For example, it is not true that the USDA charges a fee for every meat export certificate it issues. Opp. 3-4 n.4; *see* Pet. 5 (citing specific statutory and regulatory provisions). Likewise, it is not true, and the record refutes, that the USDA's investigation of ConAgra was limited to changes to the grade of meats shipped to South Korea. Opp. 6-7 n.7; *see* Pet. 20 n.7 (referencing specific record cites).

liability. The holding of that case was not limited to potential fines or penalties, as Bahrani argues, but instead concerned the lack of an actionable "obligation" where one neither requested nor received a specific government service.

The issue here is indistinguishable from that in *Q International*. Under the holding of *Q International*, even assuming that ConAgra *should have* obtained replacement export certificates to comply with applicable regulations, ConAgra had no *obligation to pay for* certificates where such certificates were not requested or issued, and thus ConAgra could not have violated the FCA. The Tenth Circuit reached the opposite conclusion, holding that a party can violate the FCA by not obtaining a regulatory certificate that has a user fee associated with it. In other words, under the Tenth Circuit's view, avoiding FCA liability would require a person to engage in an affirmative act not specified in the FCA, rather than simply refraining from making or using a false record to conceal, avoid, or decrease an existing obligation to pay or transmit money or property to the Government. The Tenth Circuit's decision therefore presents a direct circuit conflict.

The Tenth Circuit's decision also conflicts with the Eighth Circuit's requirement in *Q International*, later reaffirmed by the Sixth Circuit in *American Textile Manufacturers Institute v. The Limited, Inc.*, 190 F.3d 729, 734 (6th Cir. 1999), that, for purposes of FCA liability, the pertinent obligation to pay money or transfer property to the Government must arise

and exist *before* the defendant made or used the alleged false record. *See* Pet. 22-23.[2]

As part of his misguided focus on fines-and-penalties cases, Bahrani relies on *United States ex rel. Huangyan Import & Export Corp. v. Nature's Farm Prods., Inc.*, 370 F. Supp. 2d 993 (N.D. Cal. 2005), but that case has nothing to do with the circumstances here. In *Nature's Farm*, the defendants indisputably engaged in conduct (the importing of goods from countries subject to trade restrictions) that triggered a concrete monetary obligation to pay money to the Government (specific anti-dumping duties) that the defendants avoided by submitting a false statement (false documentation concerning the products' country of origin). *See id.* at 995-96. Here, on the other hand, because ConAgra never requested or obtained replacement export certificates, ConAgra never incurred a concrete obligation to pay money to the Government. *Nature's Farm* is a straightforward application of a reverse false claim and that court did *not* hold that FCA liability may be premised solely on the failure to obtain and pay for a regulatory permit.

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[2] Bahrani also argues that this case does not merit review because the Tenth Circuit's decision does not conflict with a decision of this Court. Opp. 12. That, of course, does not counsel against review. The Tenth Circuit's decision conflicts with those of other circuits and raises an important issue of federal law that has not been, but should be, settled by this Court. *See* Sup. Ct. R. 10.

For the same reasons, Bahrani's comparison of ConAgra to a person who uses the United States Postal Service without paying the required postage also fails. Opp. 27-28. ConAgra, like the defendants in *Q International*, did not seek or obtain governmental services for which it failed to pay – ConAgra never requested or received the inspection services associated with replacement export certificates. In any event, Bahrani's contention that any person who mails a letter without paying the proper postage is subject to reverse-false-claim liability under the Tenth Circuit's framework serves only to illustrate the potentially wide-ranging applicability of the decision and the importance of the Question Presented for review.

III. Bahrani's Arguments About Ancillary Matters Do Not Diminish the Importance of the Question Presented.

A. The issue presented is not whether "regulations can form the basis of a valid FCA obligation."

Bahrani argues that this case does not merit review because the Tenth Circuit agreed with other circuits "in determining that governmental regulations can form the basis of a valid FCA obligation." Opp. 13. ConAgra does not dispute that a government regulation *can* form the basis of a valid FCA obligation where the regulation creates an existing obligation to pay money or transmit property to the Government. But this case goes far beyond that

broad, non-controversial proposition. The important question is whether FCA liability can be based on a violation of a regulation that does *not* impose an obligation to pay money or transmit property to the Government. As demonstrated in the Petition, there is no applicable regulation that obligates ConAgra to pay for export certificates that ConAgra never requested and that the Government never provided. Bahrani does not refute that proposition. Pet. 13-14.

Bahrani also argues that the Tenth Circuit's decision should stand because the export certification process "serves to instill confidence in U.S. meat and poultry products throughout the world," and thus ConAgra's correction of export certificates purportedly "jeopardized the integrity of the United States export process." Opp. 8. Those rhetorical flourishes are beside the point. It is well settled that the FCA is not a "super enforcement" tool that can be used to punish regulatory violations that do not avoid an existing obligation to pay money or transmit property to the Government. Pet. 17-18. It is immaterial whether ConAgra is subject to some other sanction for correcting export certificates (which ConAgra disputes). The important point is that ConAgra should not be subject to liability under the FCA under the circumstances presented in this case.

B. This Court should not defer review merely because this case was decided on summary judgment.

Bahrani argues that review by this Court is unnecessary at this time because ConAgra obtained summary judgment in the district court, which was reversed and remanded for trial by the Tenth Circuit, and the case is proceeding in the district court. Opp. 11-12. There is no merit to this argument. A trial will not "illuminate" or otherwise develop the issue presented to the Court. Lower courts have long struggled over what constitutes an "obligation" under the FCA, and the Tenth Circuit's decision fully and clearly frames the issue presented to this Court for review. Trial on the merits and a subsequent appeal would not alter the court of appeals' holding that the FCA extends to situations where a regulated entity fails to obtain a necessary permit or certificate that has a user fee associated with it. This is an important federal question on which the circuits have split, and it does not require further development before it is ripe for review. To the contrary, deferring review would only cause more litigation with additional uncertainty and prolonged confusion. *See* Pet. 23.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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